United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-7430-7535

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

LOCAL 771, I.A.T.S.E., AFL-CIO,

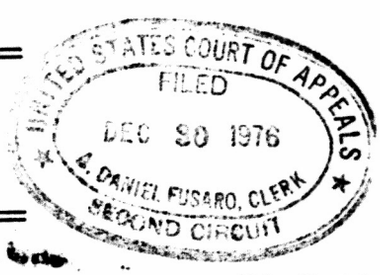
Plaintiff-Appellee-Cross-Appellant,

—v.—

RKO GENERAL, INC., WOR DIVISION,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANT'S REPLY BRIEF AND BRIEF AS CROSS-APPELLEE

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UNITED STATES COURT OF APPEALS
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Plaintiff-Appellee-Cross-Appellant,

-v-

RKO GENERAL, INC., WOR DIVISION,

Defendant-Appellant-Cross-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S REPLY BRIEF AND BRIEF AS CROSS-APPELLEE

The Union's cross-appeal from the lower Court's refusal to vacate the arbitration award is totally without merit. The Union deliberately chose not to file a demand for arbitration, as required by the collective bargaining agreement, until almost 11 months after the grievance arose. The bargaining

agreement provides that arbitration must be "resolved", or at least commenced, within 6 days from the time of a dispute. The labor arbitrator chosen by the parties properly held that the Union's attempt to assert its grievance was barred by the contractual time limitation.*

No amount of hyperbole, or references to "facts" not in the record,** or character assassination of the arbitrator can change the one determinative fact: the Union failed to demand arbitration until long after the expiration of the period allowed by the bargaining agreement. The arbitration award clearly drew its essence from the bargaining agreement. The rule, therefore, of United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), requires affirmance of the lower Court's refusal to set the award aside.

The Union has virtually nothing to say in response to the Company's appeal from the portion of the order permitting

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* The Union's brief includes a vituperative attack on the arbitrator whom it selected and who rendered the award. As shown below, the authorities are unanimous that a party cannot remain silent until after an adverse award has been rendered and then launch an attack on the arbitrator's impartiality.

** Throughout its brief, the Union relies upon statements and "repeated announcements" allegedly made by Judge Pollack which do not appear in the record and undoubtedly were not made (see, e.g., Brief at 16, 24, 29).

a court trial of the very same grievance. A reply to the Union's cursory argument on pages 38-39 of its brief is not necessary. It is beyond question, in our view, that (1) the Union has no right to judicial relief because arbitration was its exclusive remedy under the bargaining agreement, and (2) even assuming the agreement allows a party the option of maintaining a court action, the Union is bound by its own prior election to submit its grievance to arbitration. See Appellant's Brief, Point I.

ARGUMENT

THE PORTION OF THE ORDER CONFIRMING THE ARBITRATION AWARD SHOULD BE AFFIRMED.

The national policy favoring resolution of labor disputes by arbitration* requires that judicial review of a labor arbitrator's award be narrowly circumscribed. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974); Torrington Co. v.

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* See United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960); Gangemi v. General Electric Co., 532 F.2d 861, 865 (2d Cir. 1976).

Metal Products Workers Local 1645, 362 F.2d 677, 680 (2d Cir. 1966); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969).

Moreover, questions of "procedural" arbitrability, such as the timeliness of a demand for arbitration, are for the arbitrator rather than the courts. "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964).

This Court has specifically held, in affirming an order compelling arbitration, that the timeliness of an arbitration demand under a collective bargaining agreement is a question for the arbitrator. Rochester Telephone Corp. v. Communications Workers of America, 340 F.2d 237, 239 (2d Cir. 1965). See also Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491-92 (1972); Carey v. General Electric Co., 315 F.2d 499, 501-04 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964); Tobacco Workers International Union v. Lorillard Corp., 448 F.2d 949, 953-54 (4th Cir. 1971).

An arbitrator's ruling on an issue of timeliness is subject to the same limited standard of review enunciated in Enterprise Wheel & Car Corp., supra. Therefore such a

ruling must be confirmed, the Courts have held, if it draws its "essence" from the bargaining agreement. See Yellow Cab Co. v. Democratic Union Organizing Committee, 398 F.2d 735, 737-38 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969); N F & M Corp. v. United Steelworkers, 524 F.2d 756, 759-60 (3d Cir. 1975); Newspaper Guild v. Philadelphia Newspapers, 87 LRRM 2760 (E.D. Pa. 1974).

In this case, the collective bargaining agreement provides:

> "Arbitration must be resolved ninety (90) days after the occurrence of the event ..." (§15.02, 25a)

And that:

> "The parties may submit to arbitration in accordance with the rules of the American Arbitration Association upon written request of either party ..." (§16.01, 26a)

Section 7 of the Rules of the American Arbitration Association ("AAA"), which the parties incorporated in their agreement, provides that arbitration is initiated by filing a notice demanding arbitration with the AAA Regional Office (125a). It is undisputed that the Union failed to file such a notice until January 12, 1976, almost 11 months after the minicam work assignment dispute arose (114a). The arbitrator held in his Opinion and Award dated April 9, 1976, in

accordance with the "essence" of the agreement:

> "As the parties well know, the arbitrator is bound by the provisions of the collective bargaining agreement including express time limits for the submission of disputes to arbitration where there has been no waiver thereof. The contract requires the referral of disputes to arbitration within ninety days. In the instant case the Union did not comply with that explicit time limit which the parties negotiated and made part of their collective agreement. Nor is there evidence of that waiver." (38a-39a)

The Union's arguments challenging the Court's refusal to vacate this award are discussed below. It will be seen that none has the slightest merit.

I

The Union contends on page 23 of its brief that its complaint in the court action, filed shortly after the dispute arose, was the equivalent of a timely demand for arbitration. The Union argues, in effect, that the arbitrator should have rewritten the bargaining agreement so that it is sufficient if a court complaint is filed within 90 days. If the arbitrator had done as the Union requested, the Union would have had the right to sit back for 11 months -- or for an indefinite longer period -- before finally deciding whether to invoke the AAA arbitration process.

The arbitrator understandably refused to rewrite the contract. Section 16.02 of the bargaining agreement states: "The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this Agreement" (26a). The arbitrator simply enforced the 90-day contractual time limit according to its terms. That was the only result compatible with the terms of the agreement and the familiar rule that the "plain meaning" of contractual provisions cannot be ignored. E.g., Communications Workers of America v. New York Tel. Co., 327 F.2d 94, 97 (2d Cir. 1964). At the very least, as the lower Court held, "the arbitrator's refusal to deem [the complaint] a sufficient demand cannot be termed irrational, ultra vires or a clear error of law" (129a).

II

The Union argues on page 22 and elsewhere in its brief that the allegedly "multilateral" nature of its grievance excused compliance with the contractual time limit. A complete answer to this argument is that the Union amended its complaint, only four days after it was filed, to delete its request for multilateral arbitration (120a). The lower Court found that the Union "itself demanded bilateral arbitration in this case and, therefore, the resulting arbitral proceedings must be governed by the bilateral arbitration agreement between the

parties" (128a).

In situations, moreover, in which multilateral arbitration is appropriate, the correct procedure is to serve arbitration demands on the other parties pursuant to the several bargaining agreements, and then to petition the Court to compel consolidated arbitration. See Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n, 414 F.2d 1326, 1327 (2d Cir. 1969). This the Union failed to do. And because arbitration is solely a creature of contract, Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974); John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964), multilateral arbitration can take place only in accordance with the arbitration clauses in each of the various bargaining agreements.

In this case, the bargaining agreement between the Company and Local 644, the Union's original co-plaintiff, did not contain a provision for arbitration (109a). Thus it is unlikely that multilateral arbitration could ever have been had.

III

The Union claims, beginning on page 24 of its brief, that its failure to comply with the agreement was excused by the pendency of Section 10(k) proceedings before the National Labor Relations Board. However, as the lower Court

held (129a), the law is clear that the pendency of an NLRB proceeding under Section 10(k) of the Labor Management Relations Act does not prevent a party from demanding arbitration, or proceeding to arbitration, of the same grievance. New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 766-67 (5th Cir. 1966); Lodge 1327, Int'l Assn. of Mach. & A.W. v. Fraser & Johnston Co., 454 F.2d 88, 90-91 (9th Cir. 1971), cert. denied, 406 U.S. 920 (1972); Local 210, Int'l Printing Pressmen & Assistants Union v. Times-World Corp., 381 F. Supp. 149, 152 n.3 (W.D. Va. 1974); Cast Optics Corp. v. Textile Workers Union of America, 333 F. Supp. 239, 241 (S.D.N.Y. 1970).

Judge Lasker's recent decision in Moshlak v. American Broadcasting Company, 76 Civ. 260 (S.D.N.Y. December 7, 1976), cited in the Union's brief at page 29, is in complete accord with the Company's position. Judge Lasker held in Moshlak that a proceeding by the NLRB under Section 10(k)

> "does not preclude a party from parallel court prosecution of a §301 claim, however conditional the outcome of such a suit may be. See New Orleans Typographical Union #17...* (slip. op., p.8)

The Union also claims that filing a demand for arbitration would have been in violation of the injunction, issued at the NLRB's request, which prohibited the Union from "threatening, coercing, or restraining WOR-TV, or any other person ..." (57a).

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* The collective bargaining agreement in Moshlak did not contain an arbitration clause.

The Union tacitly admits the obvious on pages 24-25 of its brief -- the assertion of a right to arbitration is neither "coercion" nor a "threat" or "restraint", on any person. See Sheet Metal Workers Local 28, 222 NLRB #110 (1976); Sheet Metal Workers, 209 NLRB 1177 (1974). There is nothing to the contrary in Sperry Systems Management Division v. N.L.R.B., 492 F.2d 63 (2d Cir.), cert. denied, 419 U.S. 831 (1974), or in the other decisions cited on pages 25-28 of the Union's brief.

IV

Starting on page 29 of its brief, the Union argues that the Company resisted and obstructed arbitration, and thus is estopped from invoking the contractual limitation of time. The fallacy of the Union's claim is shown by its misplaced reliance upon Los Angeles Newspaper Guild, Local 69 v. Hearst Corp., 504 F.2d 636 (9th Cir. 1974), cert. denied, 421 U.S. 930 (1975). Examination of the opinion in Hearst shows that it does not in any way support the Union's position.

It is not true, as the Union implies on page 30 of its brief, that the section of the contract which was before the Court in Hearst contained a time limit, and that it was the arbitrator's award enforcing that time limit which was

vacated by the Court. The time limit which the arbitrator imposed in Hearst was nothing more than a concoction of his own. The Court emphasized in Hearst that the arbitrator took "into his own hands the timeliness of his own appointment, a matter quite dehors the agreement and parenthetically quite unsupported by the facts." 504 F.2d at 642. As the lower Court noted in its opinion in this case (130a), the Court found in Hearst that the arbitrator "creat[ed] a quasi statute of limitations not in the agreement ...." Id. at 640.*

In Hearst, moreover, the employer was the cause of delay because it refused to participate in the selection of an arbitrator after the union had served a timely demand for arbitration. In the case at bar, the Company did not at any time attempt to prevent the Union from initiating the arbitration process, and did not interfere with, or delay,

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* The 60-day provision in Hearst which the Union cites on p.30 of its brief (but is not mentioned in the Ninth Circuit's opinion) was not involved in the case. The section of the agreement at issue in Hearst provided that if an arbitrator was not selected jointly by the parties within five days, "then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator...." 504 F.2d at 639. It was the absence of a time limit within which "to request the American Arbitration Association to proceed to the appointment of an arbitrator" which was before the Court in Hearst and in place of which the arbitrator devised a 60-day limit "dehors the agreement and ... unsupported by the facts." 504 F.2d at 642.

either the selection of the arbitrator or the arbitration hearing itself. Indeed, when the Union finally did demand arbitration, the Company (preserving its position that the claim was by then time-barred) joined the Union in selecting the arbitrator and participating in the hearing (4a-5a, 114a-115a).

Rule 27 of the AAA provides that if a party demands arbitration and his adversary does not participate, the arbitration may proceed unless the law provides to the contrary. Section 16.04 of the bargaining agreement in this case (26a) is to the same effect. The only way to prevent the AAA from continuing to process the demand, and actually scheduling and holding a hearing, is to obtain a stay from the Court. If the Union had simply filed a timely demand for arbitration, that would have tested any alleged resistance or obstruction by setting the arbitration process in motion, thus forcing the Company either to arbitrate or to obtain a stay. As the Union did not demand arbitration, however, there was nothing for the Company to resist.

V

The Union also claims, on pages 33-35 of its brief, that the NLRB determination in August 1975 (79a) created a new dispute, i.e., a new "event" within the meaning of

Section 15.02 of the agreement (25a). The Union met with the Company in November 1975 (131a) after taking three months to decide not to appeal the NLRB's decision, and then, more than 140 days after the so-called new "event", finally filed a demand for arbitration on January 12, 1976 (51a). Somehow all of this is supposed to have relieved the Union of its obligation under Section 15.02 to file an arbitration demand within 90 days after February 21, 1975. The lower Court rejected this surprising contention out of hand (131a).

The Company announced on February 21, 1975 that it had decided not to assign the editing work to members of the Union (119a). The work has been performed by other employees continuously from that time to date. There has been no change in the factual situation during the 23 months since February 1975. It is sheer pretense to argue that either the NLRB decision or a luncheon meeting between the parties in November 1975 (73a) converted the dispute into a new dispute or "event" under Section 15.02.

VI

The Union claims that the arbitrator, Eric J. Schmertz, Esq., was biased in favor of the Company because one of the senior labor partners in the law firm representing the Company serves with Schmertz on the Board of Collective Bargaining of

the New York City Office of Collective Bargaining (the attorney as a City Representative and Schmertz as an Impartial Representative) and the attorney's vote is needed for Schmertz to retain his membership on the Board (Union's brief, fn. on page 4).

The fact that Schmertz and the attorney serve together on an official body does not furnish the slightest basis for disqualification. The Board of Collective Bargaining is a public body created pursuant to the New York City Charter and the New York City Collective Bargaining Law. The seven members of the Board are selected from various sectors of the community. Mr. Schmertz has served on the Board since its inception.* The attorney who serves as a City Representative was appointed to the Board by the Mayor in September 1968. The Board administers collective bargaining, mediation and related procedures involving only City employees, and does not have any private functions.

The claim of bias against Arbitrator Schmertz is without merit for the additional reason that it is an afterthought first raised by the Union after it received an unfavorable award. The Union's attorney, Mr. Meyer, indicated in his affidavit in support of the Union's motion to vacate, that he

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* He is also Professor of Law at Hofstra University School of Law.

was aware of the facts prior to the arbitration hearing.

> "I am obliged to state that based on past experience I would not have acquiesced in the assignment of this case to Arbitrator Schmertz if I had known that the attorney for the defendant at the arbitration was going to be the Proskauer law firm, that was substituted herein." (62a)

The District Court rejected the Union's claim of bias without comment.

Mr. Meyer was notified on February 4, 1976, almost two months before the arbitration hearing, that Proskauer Rose Goetz & Mendelsohn would represent the Company in the arbitration. The Union did not at any time request that Schmertz step aside for that reason. Contrary to Mr. Meyer's unsupported statement in the record (62a), the designation of an arbitrator can be and often is revoked or withdrawn after his appointment. In this case, in fact, Meyer asked to have Schmertz "relinquish jurisdiction" after the Proskauer firm was substituted as counsel to the Company, but on an entirely different ground. In a letter to the AAA dated February 10, 1976, Meyer asked for the appointment of

> "... another arbitrator available with an earlier date who will be able to discipline the employer in this matter.... If Mr. Schmertz cannot set up a pre-hearing conference on a February date to dispose of the insubstantial and dilatory arbitrability claim, I would ask

> that he relinquish jurisdiction in the case and that another mutually selected arbitrator schedule a prompt hearing."*

In 1971, after Schmertz had been on the Board of Collective Bargaining for four years and the attorney in the Proskauer firm had served on the Board for three years, Schmertz was chosen as single arbitrator in an unrelated matter in which Mr. Meyer and the Proskauer firm represented opposing parties. An award against Mr. Meyer's client was rendered on October 20, 1971. On October 21, 1971, Meyer applied to Schmertz to modify his award. The application stated that it was without prejudice to an application to the state court to vacate the award pursuant to New York C.P.L.R. 7511(b), which includes partiality of the arbitrator as a ground for vacatur. The entire application was withdrawn by Mr. Meyer on October 26, 1971.

The courts have always refused to review a claim of bias against an arbitrator made for the first time after his award has been rendered. See Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 449 F.2d 106 (2d Cir. 1971), cert. denied, 405 U.S. 921 (1972). In Cook, the District Court's refusal to set aside an arbitration award was affirmed because the unsuccessful claimant-seller was shown to be fully aware of the

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* A copy of Mr. Meyer's letter to the AAA is set out as an addendum to this brief.

substantial business dealings between the employer of one of the arbitrators and the respondent-buyer.*

This Court held in Cook, in language applicable with even greater force in this case in which business dealings are not alleged, that a party "cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first" (at 107-08).**

Confirmation of the arbitrator's award is required here, as it was in Cook and the cases cited in the preceding footnote. There is no factual basis for the Union's claim of bias, and it is obviously an afterthought. The Union's groundless attempt to impugn the arbitrator's integrity after receiving an unfavorable award is but a further indication of the lack of substance to its entire position.

We have shown in this brief that the arbitration award was properly confirmed and should be treated as conclusive.

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* It will be noted, in this case, that neither of the parties is alleged to have any connection with the arbitrator.

** See also Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973), cert. denied, 416 U.S. 986 (1974), aff'g 356 F. Supp. 1, 12 (S.D.N.Y. 1973); Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567, 574-75 (4th Cir. 1975); Amalgamated Meat Cutters v. Cross Bros. Meat Packers, Inc., 518 F.2d 1113, 1121 and n.19 (3d Cir. 1975); Eckert v. Budd Co., 76 Labor Cases ¶10,818 at 18,762 (E.D. Pa. 1975).

The lower Court's refusal to dismiss the court action based on the same grievance cannot be reconciled with its confirmation of the award, and must be reversed. Allowing protracted pre-trial proceedings and a trial of the same dispute would make the Court's prior confirmation of the award a hollow ceremony, and would render both the bargaining agreement and the arbitration process meaningless.

CONCLUSION

The portion of the order confirming the arbitration award should be affirmed. So much of the order as allows the court action to proceed in spite of that award should be reversed, or a writ of mandamus directing the District Judge to vacate that portion of his order should be issued.

Respectfully submitted,

Proskauer Rose Goetz & Mendelsohn

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December 30, 1976

ADDENDUM

HOWARD N. MEYER
LAW OFFICE
270 MADISON AVENUE
NEW YORK, N. Y. 10016
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February 10, 1976

American Arbitration Assn.
140 West 51st Street
New York,N.Y. 10020
Attn: Ann Caufield,Tribunal
Administrator

Re: 1330 0046 76
Local 771 and RKO General,Inc.
WOR Division

Dear Ms. Caufield:

I have been informed that Mr. Schmertz has no date earlier than April 26th and that the attorney for the employer does not even accept those dates.

It happens that this is a case in which the employer has been using dilatory tactics ever since December, when it had another attorney, and apparently its change of attorneys is part of those dilatory tactics, and now the inability to agree even on April 26th, 8th, and 9th, I regard as dilatory.

I ask that the Association determine whether there is another arbitrator available with an earlier date who will be able to discipline the employer in this matter, in view of the dilatory misconduct; or in the alternative that Mr. Schmertz set up a pre-hearing conference on arbitrability,on a February date.

If Mr. Schmertz cannot set up a pre-hearing conference on a February date to dispose of the insubstantial and dilatory arbitrability claim, I would ask that he relinquish jurisdiction in the case and that another mutually selected arbitrator schedule a prompt hearing. I appreciate the fact that Mr. Schmertz is an extremely popular and busy arbitrator and it may be difficult for him to do justice in this case, to the extent that setting an early date for hearing is necessary in order to provide the proper remedy.

Sincerely,

Howard N. Meyer

HNM:rf
cc:J.Ruthizer,Esq.
:L.R.Batterman,Esq.
Proskauer,Rose,Goetz& Mendelsohn
:J.Appell,L.771

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